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AND...
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JULY 14 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ANTHONY TISCARENO,)	Nos. CV-09-63-GF-SEH
)	CR-02-12-GF-SEH
Petitioner,)	
)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

On August 25, 2009, the Court issued its Order denying Petitioner's Motion under *Audita Querela*.¹ Petitioner appealed. On May 28, 2010, the Ninth Circuit Court of Appeals issued its Order which remanded this matter "for the limited purpose of granting or denying a certificate of appealability." (Order at 1, United States v. Tiscareno, No. 09-35808 (9th Cir. May 28, 2010).)

¹ *Audita querela* is a common law writ used to attack a judgment that was correct when rendered, but that later became incorrect because of circumstances that arose after the judgment was issued. Carrington v. United States, 503 F.3d 888, 890 n. 2 (9th Cir. 2007).

A certificate of appealability (COA) may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Hohn v. United States, 524 U.S. 236 (1998); Lambright v. Stewart, 220 F.3d 1022, 1024 (9th Cir. 2000). To obtain a COA, the movant must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a claim is dismissed on procedural grounds, the movant must demonstrate that reasonable jurists “would find it debatable whether the district court was correct in its procedural ruling.” Lambright, 220 F.3d at 1026; Slack, 529 U.S. at 484. Any doubt as to whether a petitioner has met the standard is resolved in his favor. Lambright, 220 F.3d at 1025.

A writ of *audita querela* is not an available remedy in this case as the claim asserted by Petitioner would be cognizable in a § 2255 habeas petition. Carrington v. United States, 503 F.3d 888, 890-91 (9th Cir. 2007). Tiscareno previously filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. The motion was denied. A certificate of appealability was subsequently denied by the Ninth Circuit Court of Appeals. United States v. Tiscareno, No. 08-35723 (9th Cir. June 18, 2009). Reasonable jurists could find no basis for addressing the merits of the Motion under Audita Querela. A COA is not warranted.

ORDERED:

A certificate of appealability is DENIED.

DATED this 7th day of June, 2010.

A handwritten signature in black ink, reading "Sam E. Haddon", written over a horizontal line.

SAM E. HADDON

United States District Judge